U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: April 28, 1998

Case No.: 97 INA 320

In the Matter of:

ROBERT F. ROSENSTIEL,
Employer

On behalf of:

EUPHRASIA ARREOLA-GARCIA,
Alien

Appearance: R. H. Bonaparte, Esq., of Los Angeles, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of EUPHRASIA ARREOLA-GARCIA (Alien) by ROBERT F. ROSENSTIEL (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability. [2]

STATEMENT OF THE CASE

On February 14, 1995, the Employer applied by ETA form 750A for alien labor certification for the permanent full time employment of the Alien as a "Cook, live-in" with the following duties:

> Plans menus, prepares & serves special diet meals incl. breakfast, lunch & dinner for a 76 yrs old man with coronary problems under strict physician control. Orders food & household supplies for residence. Organizes & plans dinner & other entertainment functions for employer. Overal resp. for 4000 sq. ft. res. in employer's absence or incapacity with household managerial duties incl. supervising & coordinating activities of household employees & contractors i.e. cleaning crew, gardener, poolman, electricians, repair contractors & dry cleaning.

AF 144, 147.[3] The position was classified as Cook (Domestic Ser.), under DOT Occupational Code No. 305.281-010.[4] In the form ETA 750A the Employer said the Alien was to work a basic 40 hour week with overtime as needed. The hours were to be from 9:00 to 12:00 a.m. and 1:00 to 5:00 p.m., at the rate of $512 per week with time and a half for overtime. The formal education was completion of high school, but Employer required two years of experience in the Job Offered. By way of Other Special Requirements, the Employer specified, "Ability to prepare special, physician-prescribed diets," and "24 hour availability." After the job was advertised, seventeen applicants were referred, but none was hired for the position for the reasons stated in the Employer's report. AF 158-159, 163-164, 143.

Notice of Findings. On March 29, 1996, the Notice of Findings stated that, subject to the Employer's rebuttal, the application would be denied on grounds that (1) the duties described in

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]Copied verbatim without correction or change.

[4]305.281-010 **COOK (domestic ser.**) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.).
GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81

the ETA 750A did not appear to constitute the full-time position clearly open for the referral of U. S. workers, as required by 20 CFR §§ 656.3, 656.20(c)(8): (2) the terms and conditions of employment are unlawful under 20 CFR § 656.2(c)(7);[5] (3) the job requirements appeared to be unduly restrictive under 20 CFR §§ 656.21(b)(2)(i)(A) and 656.21(b)(2)(iii) in that the Employer required the worker to live in and be available twenty-four hours a day; (4) the job offered is a combination of the duties of a "Home Housekeeper and a Domestic Cook under 20 CFR § 656.21(b)(2)(ii);[6] (5) the Employer failed to establish that the U. S. workers who applied for this position were rejected for reasons that were both lawful and job-related as required by 20 CFR §§ 656.21(b)(6) and 656.24(b)(2)(ii). Noting that Employer's burden of proof required it to establish under 20 CFR § 656.1 that there are not sufficient U. S. workers "able, willing, qualified and available" to perform the job, the CO's instructions described the evidence needed to rebut the NOF findings as to the defects listed above.

Rebuttal. On May 1, 1996, the Employer filed a rebuttal to address the issues noted in the NOF. AF 113-132. The rebuttal consisted of the Employer's statement describing his need for the services of a live-in cook and his reasons for rejecting some of the applicants for this position. In addition, the Employer filed invoices to show the use of contractors to perform cleaning services, forms showing the wages Employer had paid to household workers in the past, and a letter by a doctor to verify his condition and the level of care he needed.

Final Determination. In the Final Determination issued July 8, 1996, the CO summarized the NOF and explained the reasons certification was denied in the order that followed. First, the CO found that the Employer failed to establish the existence of a full time position for a cook in discussing the work to be performed in this job. The Employer's evidence consisted of broad, general statements but no supporting details about the work that was required of a Domestic Cook in this household. The CO concluded that,

> Because the employer's assertions are vague and not detailed, they are of little probative value.
> The employer's rebuttal provided NO evidence or even mentioned the violations cited of combination of duties of a housekeeper, home, and domestic cook [set out in] Finding IV of the NOF. He was advised in the NOF that certification will be denied if he fails to establish that the combination of duties is customary or that combination of duties rests on business necessity. Therefore, that finding is deemed admitted by the employer and the employer remains in violation of 20 CFR 656.21(b)(2)(ii).

AF 112-113. The CO further explained that the NOF stated that three of the U. S. workers appeared to meed the minimum job requirements due to their extensive experience as cooks, and Employer was also told in the NOF that he could not reject these candidates for their failure to submit references when this was not one of the job requirements of his application and recruiting

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[5]The CO observed that the Alien had been working in the position offered since June of 1981, a period that exceeded fifteen years.

[6]The CO cited **H. Stern Jewelers, Inc.**, 88 INA 421 (May 23, 1990).

advertisements. As the Employer's evidence did not prove the absence of U. S. workers in the rebuttal, he remained in violation of 20 CFR §§ 656.1 and 656.24(b)(2)(ii). Finding that the rebuttal did not demonstrate that a domestic cook would be engaged in work throughout forty hours a week, as asserted in the job offer, the CO concluded that Employer did not sustain his burden of proving the existence of permanent, full time work for a domestic cook, and the application for alien labor certification was denied. AF 112-113.

Appeal. The Employer moved for reconsideration of the denial of certification on August 9, 1996, which the CO denied on September 26, 1996. AF 01-107. Relying entirely on his construction and application of a finding of the State employment agency to substantiate the existence of permanent full time employment as a domestic cook, the Employer did not respond to the CO's finding that no detailed evidence of the work a cook would perform for forty hours a week was filed in compliance with the NOF. Referring to other findings by the "EDD," the Employer said, "[T]his satisfied EDD. It should satisfy the examiner on this point." AF 06. The Employer then relied on the ruling of the State agency on the combination of duties and again concluded, "That should have satisfied the examiner as it satisfied EDD." Continuing in this vein, the Employer discussed the resumes of three U. S. applicants in the context of the combination of duties and observed that, "The examiner did not notice or comment upon the combination of duties and resulting resume of the three applicants." Finally, the Employer offered new evidence for the record, which he attached to his appeal. He concluded his argument by contending that the denial of certification should be vacated and a second NOF issued as to his arguments, requesting in the alternative the summary approval of certification. The CO disagreed and denied reconsideration, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*), and explaining that

> Motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal. ... Since the present motion does not raise such matters it is **denied**.

Discussion

First, the new evidence that Employer filed with the motion for reconsideration of the denial of certification cannot be considered by the Board, whose deliberations are limited to the evidence referred in the Appellate File. 20 CFR § 656.26(b)(4), **Cappriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

In Employer's argument in support of relief after the Final Determination, he pointed to the statements and findings by EDD, the local employment service, contending that the CO was in some way bound by the EDD's purported conclusions in the critical issues of the NOF. It is a fundamental and well-established principle that the CO is not bound by any statements or actions of the local employment service in the review of an application for alien labor certification under the Act and regulations. **Peking Gourmet,** 88 INA 323 (May 11, 1989); **Aeronautical Marketing Corp.**, 88 INA 143 (Aug. 4, 1988). The NOF was intended to make Employer aware of the additional evidence needed to present sufficient evidence to prove his case.

Moreover, the holdings in **Peking Gourmet** and **Aeronautical Marketing Corp.**, clearly lead to the observation that Employer's failure to comply with NOF directions to file the supporting documentary evidence explicitly delineated by the CO are not excused or explained away by suggesting that he relied on the alleged findings of EDD in his failure to comply.[7] This is consistent with the holding of the Board in **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*), that, if the CO requests a document that has a direct bearing on the resolution of an issue that is obtainable by reasonable effort, an employer must produce it. The principle applies with equal force to requests for specific documents as in **Bakst International,** 89 INA 265 (Mar. 14, 1991), and requests for information that is to be supplied in documents that will be created for the purpose of conveying such information to the CO, as in **Rainbow Imports, Inc.**, 88 INA 289 (Oct. 27, 1988).

The failure to comply with the NOF directions had a tangible effect on the Employer's proof in this case. The evidence not filed was again visited in the Final Determination, where the CO explained that the denial of certification was based on Employer's failure of proof based on the omission of the specific evidence needed to establish the existence of a position of permanent full time employment for a Domestic Cook within the meaning of his application for alien labor certification. The panel agrees with the CO's finding that the Employer failed to prove that a position of permanent, full time employment as a Domestic Cook existed under 20 CFR § 656.3, and concludes that the CO's conclusion of fact is supported by the evidence of record.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[7]The Employer's repeated denigration of the "examiner" was neither appropriate nor persuasive, since the instructions and findings his arguments attributed to an "examiner" were, in fact the NOF conclusions of the CO, and requests by the CO for further evidence on which to determine whether the Employer sustained his burden of proving the facts on which to base a grant of the relief that he was seeking.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.